

The Extraterritorial Application of Human Rights Norms

By Katherine Hoy*

1. Introduction

In examining the relationship between jurisdiction, human dignity and the power of the state, John Cerone states that the international community's conception of human rights law (IHRL) as both transcendental and universal has challenged the limits of jurisdiction "far more than the force of legal reasoning from positive law."¹ The emergence of the individual human being as a subject of individual law constitutes, for Cerone, the key structural development in enabling human rights law to infiltrate the state's domestic jurisdiction.² In this vein, the question of the application of human rights law extraterritorially centers on the purpose of the norms underlying the birth of human rights law, namely that the recognition of human dignity has at its foundation the protection of the individual from the abuse of states.³

In view of contemporary "legal black holes" such as Guantanamo Bay, Ralph Wilde observes that the extraterritorial application of human rights law has to be re-examined in situations of foreign occupation or administration.⁴ The question, for Wilde, is pertinent in view of sparse case law, divergent State practice and the deficiency of international humanitarian law to address the full range of issues at play in the occupation context. In lamenting the absence of human rights law arguments raised by the petitioners in the consolidated U.S. Supreme Court decision *Boumediene v. Bush* and *Al Odah v. United*

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¹ J. Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & The Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 *Isr. L. Rev.* 396, at 451 (2007)

² *Id.*, at 450.

³ *Id.*, at 452.

⁴ R. Wilde, *Are Human Rights Norms Part of the Jus Post Bellum, and Should They Be?* in C. Stahn & J. Kleffner (Eds.), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, 163 at 163 (2008).

States,⁵ Fiona de Londras echoes Wilde’s concern that the exclusion of human rights norms as part of *jus post bellum* fails to acknowledge the capacity of international law to influence domestic constitutional standards.⁶ In examining the meaning of the scope of the application of human rights law in both the International Covenant on Civil and Political Rights⁷ and the European Convention of Human Rights⁸, the ‘legal vacuum’ concern will be addressed in light of the universal nature of human rights and Arnold Pronto’s assertion that IHRL is infiltrating general international law to the extent that it has become possible to speak of general international law ‘sources’ of human rights obligations.⁹

2. Preliminary Issues in the Application of IHRL Extraterritorially

The question of the applicability of IHRL extraterritorially takes on particular significance in view of Pronto’s argument that IHRL is “part and parcel” of general international law as opposed to *lex specialis*.¹⁰ According to Pronto, the expanding influence of human rights considerations or “human-rightism” no longer exists as a “self-contained” regime but as “cross-cutting theme *par excellence*” that renders IHRL as the applicable *lex generalis*.¹¹ The recognition of IHRL as a principle component of the general law extends beyond “intellectual curiosity” for Pronto, as it not only safeguards the displacement of existing human rights norms but further ensures that IHRL plays a role in the development and interpretation of human rights norms in all contexts.¹² In first examining the theoretical and methodological challenges to the application of IHRL extraterritorially in situations of occupation, I will examine the realization of Pronto’s

⁵ *Boumediene v. Bush*, 553 U.S. ____ (2008). [hereinafter *Boumediene*].

⁶ F.Londras, *What Human Rights Law Could Do: Lamenting the Absence of an International Human Rights Law Approach in Boumediene & Al Odah*, 41 *Isr. L. Rev.* 562, at 595 (2008)

⁷ International Covenant on Civil and Political Rights, March 23, 1976, 99 UNTS 171 [hereinafter ICCPR]

⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, September 3, 1953, 213 UNTS 222 [hereinafter ECHR].

⁹ A. Pronto, ‘*Human-Rightism*’ and the Development of General International Law, 20 *LJIL* 753, at 764 (2007)

¹⁰ *Id.*, at 754.

¹¹ *Id.* At 764.

¹² *Id.*

fear concerning the particularization of IHRL as demonstrated in the *Boumediene* case vis-à-vis the absence of human rights law argumentation.

2.1. Theoretical Issues

In outlining the key theoretical issues at stake in determining whether IHRL should apply extraterritorially, Wilde examines the notion of the social contract in order to demonstrate the persistence of the nexus between the state and its territory in contemporary rights discourse.¹³ Here, Wilde employs the work of John Locke who eliminated foreigners from the social contract and the protection of citizenship rights:

Foreigners, by living all their lives under another government, and enjoying the privileges and protection of it, through they are bound, even in conscience, to submit to its administration, as far forth as any denison; yet to not thereby come to be subjects or members of that common-wealth.¹⁴

Notwithstanding the evolution of the status of the individual as a subject of international law, capable of bearing international rights and duties independent of citizenship, Wilde observes that the conception of a state's "jurisdiction" solely in terms of territorially, produces a distinction in protection between nationals and aliens disregarding the UN Human Rights Committee's statement in General Comment 15 that all ICCPR obligations apply with regards to "all individuals, regardless of nationality or statelessness."¹⁵

A further issue of principle, for Wilde is the right of self-determination of those in the occupied territory: the chief concern being whether the right of self-determination is in fact compatible with the imposition of the foreign state's own human rights obligations in the occupied territory.¹⁶ In questioning whether a distinction between universal standards and the standards binding on either the occupied territory or the occupying state as opposed to the standards binding solely on the occupied state and/or envisioned to

¹³ See Wilde, *supra* note 4 at 165.

¹⁴ J. Locke, *Two Treatises of Government*, in Wilde, *supra* note 4 at 165.

¹⁵ UN Human Rights Committee, *General Comment No.15: The Position of Aliens under the Covenant*, 11 April 1986, para. 1.

¹⁶ See Wilde, *supra* note 4 at 166.

apply to a precise, territorially defined political community such as the ECHR should be delineated, Wilde is cognizant of a “double standard of legality” that may apply if illegal activities within the state’s territory are not prohibited if committed extraterritorially.¹⁷

The entry level question of whether IHRL should apply further addresses the “rule of law” which is at the center of the debate in seeking to circumvent a legal vacuum in the extraterritorial context. The problem, as outlined by Wilde, is that in many situations of foreign occupation, the occupying State “goes beyond” the type of activity that international humanitarian law (IHL) addresses.¹⁸ In reference to detainees, for instance, the issue surpasses the type of treatment, but includes the length of time they are detained and whether or not their prosecution coincides with the due process requirements.

In regards to practical considerations, Wilde inquires as to whether the application of human rights norms would inadvertently preclude an occupying power from carrying out all of its tasks rendered necessary in the *post bellum* context.¹⁹ On a similar level of inquiry, Wilde questions whether the requirement of the provision of remedies stemming from the applicability of IHRL would result in overstretch on the part of domestic and international judicial bodies to tackle the issue of human rights given the extraterritorial locus of the illegal acts.²⁰ In evaluating the normative question of whether IHRL should apply in the occupation context, Wilde’s analysis of the applicable issues is significant as he ultimately situates human rights norms as part of the *jus post bellum*.

2.2. Methodological Challenges

2.2.1. International Humanitarian Law (IHL) and Lex Specialis

In contrast to IHL which was predominantly based on the reciprocal expectations between two warring states, IHRL arose as a constitutional matter regulating the

¹⁷ *Id.*, at 175.

¹⁸ *Id.*, at 181.

¹⁹ *Id.*, at 167.

²⁰ *Id.*

internal affair between the government and its citizens.²¹ Since the Universal Declaration of Human Rights was transcribed for times of peace, Cordula Droege states that IHRL was likely not assumed to apply in situations of armed conflict including occupation.²² However, Droege, maintains that the argument stating human rights are unsuitable for “situations of strife” is misleading in view of the nature of human rights – if human rights are inherent to the human being then as a matter of principle, human rights cannot be dependent on a situation.²³

Thus, while the two bodies of law had divergent theoretical foundations, the application of IHRL in times of armed conflict became firmly established in international jurisprudence. In situations of overlap, the ICJ in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* determined three possible situations for the interplay between IHL and IHRL:

Some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matter of both of these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and as *lex specialis*, international humanitarian law.²⁴

The question thus, as emphasized by Wilde, is not whether IHRL applies extraterritorially but in which circumstances.²⁵ The threshold test for triggering the applicability of human rights in the extraterritorial context is the understanding of the term “jurisdiction” as either the existence of factual “spatial” connection between the state and the territory in which the activities occurred or a “personal” connection with the individual affected by the extraterritorial acts.²⁶

²¹ C. Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *Isr. L. Rev.* 310 at 313 (2007)

²² *Id.*, at 314.

²³ *Id.*, at 324.

²⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 ICJ Rep. 136, at para. 106.

²⁵ See Wilde, *supra* note 4 at 171.

²⁶ R. Wilde, *Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties*, 40 *Isr. L. Rev.* 503 at 508 (2007)

3. The Interpretation of “Jurisdiction” in Human Rights Treaties

While both the ICCPR and the ECHR reflect a territorial notion of jurisdiction, the precise scope of application as provided in article 2(1) of the ICCPR and article 1 of the ECHR differ in scope.²⁷ According to the UN Human Rights Committee, a state party to the ICCPR is required by article 2, paragraph 1 which provides that “each State Party...undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction”²⁸ means that “a party must respect and ensure the rights laid down in the Covenant to anyone within the power of effective control of that State Party, even if not situated within the territory of the State Party.”²⁹ The ICJ has adopted the Human Rights Committee’s position in the *Wall*³⁰ case despite the contestations of a small number of states including the United States.

The European Court of Human Rights has, as emphasized by Droege, had a more uncomplicated task of applying the Convention extraterritorially, as it only had to interpret the meaning of “jurisdiction” in Article 1.³¹ The European Court requires “effective control over a territory” on the basis that:

Any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention’s fundamental safeguard and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.³²

Thus, the effective control test is particularly satisfied in the event of military occupation. In the *Bankovic v. Belgium*³³ case, the ECHR determined that NATO’s bombardment of the Serbian Radio-Television station did not establish a jurisdictional link as the Former

²⁷ M. Dennis, “Application of Human Rights treaties Extraterritorially During Times of Armed Conflict and Military Occupation” 100. Am. Soc’y Int’l L. Proc. 85 at 87 (2006)

²⁸ See Article 2(1) ICCPR.

²⁹ UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 10, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004)

³⁰ See *Wall* case, *supra* note 24 at paras. 108-111.

³¹ See Droege, *supra* note 21 at 327.

³² *Cyprus v. Turkey*, Decision of 10 May 2001, 2001 ECHR at para. 77.

³³ *Bankovic v. Belgium*, 2001 – X11 ECHR 333 (GC)

Yugoslavia did not constitute part of the “European legal space,” thus appearing to confine the European Court’s jurisprudence.³⁴ However, as Droege observes in view of the subsequent case law the Court in *Bankovic* purely determined that the states did not have effective control over the territory, nor the persons in their power.³⁵

4. Possible Human Rights Law Arguments in the *Boumediene* Case

In the Guantanamo Bay case, *Boumediene*, heard by the US Supreme Court in December 2007, Fiona de Londras states that the decision of the counsel for the petitioners to exclude IHRL in the proceedings was not only “intellectually incomprehensible” but constituted a missed opportunity for the Supreme Court to make a significant statement on the relationship between IHRL and the individual liberties protected in the US Constitution.³⁶ Given the strength of the substantial body of IHRL, de Londras concludes that the decision to omit IHRL argumentation was deliberate in light of the two overriding factors: the uncertain status of IHRL in municipal US law and the insidious view that IHRL is inappropriate in the context of counter-terrorism.³⁷ The reluctance to rely on IHRL, as de Londras highlights extends beyond the treaty provisions as human rights norms further exist in customary international law which is further absent in the petitioner’s case rendering the decision as an “implicit acceptance” of the Administration’s position that “domestic law has a monopoly on the treatment of Guantanamo bay detainees.”³⁸

5. Conclusion

The petitioner’s decision to disregard IHRL in *Boumediene* depicts Pronto’s concern that the formalism of the categorization of the ‘branches’ of international law will lead to the displacement of existing norms in particular contexts, including situations of

³⁴ See Droege, *supra* note 21 at 328.

³⁵ *Id.*, at 329.

³⁶ See De Londras, *supra* note 6 at 594.

³⁷ *Id.*, at 588.

³⁸ *Id.*, at 593.

occupation.³⁹ In drawing from Wilde's work, the failure to recognize these norms as part of *jus post bellum* will bear potentially "unjustified" outcomes including a double standard whereby activities are not legally prohibited if committed outside a state's territory, discrimination on the grounds of nationality and a deficiency in terms of protection not addressed by either local or humanitarian law.⁴⁰ Given that a "blanket denial" of extraterritorial application is not sustainable in light of the international jurisprudence and the understanding of jurisdiction within the ICCPR and the ECHR, the proposition that IHRL is *lex generalis* safeguards the existing and developing human rights norms that must be afforded to coincide with the recognition of human dignity.

³⁹ See Pronto, *supra* note 9 at 764.

⁴⁰ See Wilde, *supra* note 4 at 185.

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